QUESTION PRESENTED

DID THE TRIAL COURT PROPERLY DIRECT THE JURY TO RETURN A VERDICT FOR THE RESPONDENT AT THE CLOSE OF ALL THE TESTIMONY IN THIS CASE?

STATEMENT OF THE CASE

Petitioners do not undertake to state the facts in clear and concise chronological order, but intermingle opinions, arguments, conclusions and statements, which are frequently unsupported on the pages cited by petitioners.

Petitioners' statement omits the following pertinent, essential facts:

1. Petitioners, who were fully conscious (169) *, stated on the day of the accident that their car went out of control (177) and they did not know what happened (178).

2. Petitioners, thereafter, stated that the accident occurred in the southbound lane (73, 74, 79, 110, 121, 122, 123); in the center lane (26, 33), and in the northbound lane (25, 127, 129).

3. Respondent's northbound truck was facing north in the northbound traffic lane and the damaged left side of Petitioners' southbound Plymouth automobile was in the northbound traffic lane (154, 155, 157, 163, 167, 168, 216).

4. Neither the front tires nor the dual rear tires of Respondent's northbound truck left any tracks or made any marks in the ice, slush, and snow, concededly covering the center lane, prior to the collision (169, 170, 186, 203).

(*Figures in parenthesis refer to pages of the printed Record.)

5. The tires of petitioners' automobile left tire and skid marks from the point where petitioners' car was driven into the ice, slush, and snow covering the center lane, extending southeast across the center lane and into the northbound traffic lane, terminating at petitioners' automobile which was facing in a westerly direction and was partially in the center and partially in the northbound lane (149, 151, 152, 153, 172).

6. Debris knocked from petitioners' automobile at the time of the impact was partially in the center lane and partially in the northbound lane (175).

7. The physical evidence disclosed that petitioners' automobile had not moved from the point of impact (153, 158, 159, 175, 181, 182).

8. The uncontradicted, undisputed physical facts showed the collision between the left side of petitioners' southbound, skidding automobile and the front of respondent's northbound truck ocurred in the northbound traffic lane (149, 152, 154, 155, 157, 158, 159, 163, 167, 168, 172).

9. Petitioners' counsel conceded that respondent's truck was being operated on that portion of the road that was clear of ice and snow (17).

10. Mr. Grody, driver of respondent's truck, testified he was driving a new truck (233) north in the northbound traffic lane; saw petitioners' Plymouth driven from the southbound lane into the slush and snow of the center lane, and when about fifty feet away, go into a skid and skid clockwise into the northbound lane (208); that he applied the foot brake and emergency hand brake (209); that the impact stalled the motor of the truck and pulled the truck to the left (210).

11. The Honorable Trial Judge did not predicate the directed verdict on the testimony of Mr. Grody but for the reason that plaintiffs had failed to establish a case under the law (307), and there had been no negligence proven as against the defendant under the law (308).

ARGUMENT

Petitioners do not contend that there exists an important question of Federal law, or that there is a conflict in the decisions of the United States Courts of Appeals, or that the questions are of great public interest or concern. The outcome is of little or no importance except to petitioners and respondent.

This petition for a writ of certiorari is merely an attempt to have this Honorable Court determine the correctness of the decision of the Trial Court in directing the jury to return a verdict for respondent at the conclusion of all the evidence, and the affirmance of the Trial Court's judgment by the United States Court of Appeals for the Sixth Circuit.

The decision of the Trial Court and the United States Court of Appeals turns solely upon analysis of the evidence in this particular case.

Petitioners aver that there existed controversial issues of fact. The only controversial issues of fact were those arising from the testimony of petitioners, Herbert Dyskant and Theodore Dyskant, who were fully conscious at the scene of the accident. Herbert Dyskant stated to Officer Ira Price that he did not know what happened (178). Theodore Dyskant stated to Officer Price that the car skidded and went out of control (177). At that time, neither petitioner charged respondent's driver with any act

of negligence. Thereafter, petitioners stated that the accident occurred in the southbound lane, the center, lane, and the northbound lane.

In the case of *Ewing* v. *Goode*, 78 Fed. 442, Mr. Chief Justice Taft said on page 444:

> "When a plaintiff produces evidence that is consistent with a hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither.

In accord:

Louisville and N. R. Co. v. *East Tennessee V. & G. Ry. Co.*, 60 Fed. 993, 999.

Gunning v. *Cooley*, 281 U.S. 90, 94.

Pennsylvania Railroad Co. v. *Chamberlain*, 288 U.S. 333, Syllabus 1, 2 and 3.

Grand Trunk Western R. R. Co. v. *Holstein*, 67 Fed. (2d) 780, 782 (6th Cir.), Syllabus 2 and 3.

Brown v. *Capitol Transit Co.*, 127 Fed. (2d) 329, Syllabus 1 and 2.

The rule is approved by the Supreme Court of Virginia in the case of *Chesapeake Western Ry.* v. *Shiflett's Admrx.*, 118 Va. 63, 71; 86 S. E. 860:

> "A demand for damages for an alleged wrongful act does not reach the province of the jury if there is no evidence of negligence, or if the evidence only suggests the possibility of negligence, or is as consistent with the absence of all negligence as with its existence. The court has no right to allow the jury to act upon a mere surmise or conjecture."

In addition to the fact that petitioners had failed to offer evidence of negligence on the part of respondent, the uncontradicted, undisputed physical facts clearly disclosed that this unfortunate accident between petitioners' skidding automobile and the front of respondent's northbound truck occurred in the northbound traffic lane.

In the case of *Lee Way Motor Freight, Inc., et al* v. *True,* 165 Fed. (2d) 38 (10th Cir.), Syllabus 2 reads as follows:

> "2. Testimony which is positively contradicted by physical facts is not entitled to credit."

In accord:

> *Galloway* v. *United States,* 130 Fed. (2d) 467 (9th Cir.), Syllabus 3 and 10.
>
> *Liggett* & *Myers Tobacco Co.* v. *DeParcq,* 66 Fed. (2d) 678 (8th Cir.), Syllabus 4 and 7.
>
> *Chambers* v. *Skelly Oil Co.,* 87 Fed. (2d) 853 (10th Cir.), Syllabus 3 and 4.
>
> *Brown* v. *Baltimore* & *Ohio R. R. Co.,* 23 Fed. Supp. 153, Syllabus 7.

The rule is approved by the Supreme Court of Virginia in the case of *Noland* v. *Fowler,* 179 Va. 19; 18 S. E. (2d) 251, Syllabus 2 of which is as follows:

> "2. Even though all the conflicts in the oral testimony have been resolved in favor of a plaintiff by the verdict of a jury, if the physical facts are such as to demonstrate that the oral evidence upon which the jury based its verdict is incredible, then the trial court and the Supreme Court of Appeals are not bound by the verdict of the jury."

And the Court granted final judgment for the defendant.

Petitioners contend that the Last Clear Chance doctrine applies. The undisputed evidence showed that the vehicles were approaching each other at speeds between thirty and thirty-five miles an hour, traveling approximately 45 feet a second; that when one hundred to one hundred-fifty feet apart, petitioners' vehicle skidded and that within two seconds the accident had occurred.

The difference between the cases cited by petitioners in support of their contention that the Last Clear Chance doctrine applied, and the instant case is that in the cited cases there was a lapse of an appreciable period of time, an opportunity for effective action, and the plaintiff had sustained the burden under the Virginia law by showing by a preponderance of the evidence that plaintiff's negligence had ceased and thereafter defendant had a clear chance to avoid the accident.

In the case of *Virginia Stage Lines, Inc.* v. *Lesny, Admrx.*, 175 Va. 351; 8 S. E. (2d) 259, Syllabus 1 and 2 read as follows:

> "1. The doctrine of last clear chance implies thought, appreciation, mental direction, and the lapse of sufficient time to act effectively upon the impulse to save another from injury.
>
> "2. A plaintiff is not entitled to recover under the doctrine of last clear chance upon a mere peradventure. He has no right to hold the defendant liable merely upon showing that perhaps, if the defendant had responded properly, promptly, and instantaneously, he might have been saved. The burden is upon him to show affirmatively, by a preponderance of the evidence which convinces the average mind, that by the use of ordinary care, after his peril was discovered, there was in fact

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioners.

ROBERT KLONSKY,
On Petition.

FILE
MAY 22
CHARLES ELMORE

In the

Supreme Court of the United States

October Term 1950

No. 693

SELMA KANTZ, Administratrix of the Estate of Manny Dyskant and Marian Dyskant, and Herbert Dyskant and Theodore Dyskant,

Petitioners,

vs.

FUGATE AND GIRTON DRIVEWAY CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM H. SELVA,
PICKREL, SCHAEFFER & EBELING,
608 Gas & Electric Building,
Dayton 2, Ohio,
Attorney for Respondent.

COURT INDEX PRESS, INC. - LAW PRINTERS - CINCINNATI, OHIO

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statement of the Case	2
Argument	4
Conclusion	9

TABLE OF CASES CITED

Brown v. Baltimore & Ohio R. R. Co., 23 Fed. Supp. 153	6
Brown v. Capitol Transit Co., 127 Fed. (2d) 329	5
Chambers v. Skelly Oil Co., 87 Fed. (2d) 853	6
Chesapeake Western Ry. v. Shifletts, 118 Va. 63, 71; 86 S.E. 860	5
Ewing v. Goode, 78 Fed. 442, 444	5
Galloway v. United States, 130 Fed. (2d) 469	6
Grand Trunk Western R. R. Co. v. Holstein, 67 Fed. (2d) 780	5
Lee Way Motor Freight, Inc., et al v. True, 165 Fed. (2d) 38	6
Liggett & Myers Tobacco Co. v. DeParcq, 66 Fed. (2d) 678	6
Louisville and N. R. Co. v. East Tennessee V. & G. Ry. Co., 60 Fed. 993	5
Noland v. Fowler, 179 Va. 19; 18 S.E. (2d) 251	6
Pennsylvania Railroad Co. v. Chamberlain, 288 U.S. 333	5
Virginia Stage Lines, Inc. v. Lesny, Admx., 175 Va. 351; 8 S.E. (2d) 259	7

In the

Supreme Court of the United States

October Term 1950

No. 693

SELMA KANTZ, Administratrix of the Estate of Manny Dyskant and Marian Dyskant, and Herbert Dyskant and Theodore Dyskant,

Petitioners,

vs.

FUGATE AND GIRTON DRIVEWAY CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 297-308) is not reported. The Court of Appeals for the Sixth Circuit, in affirming the judgment of the District Court, did not render an opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8th, 1951. No petition for rehearing was filed. The jurisdiction of this court is sought to be invoked by petitioners under Title 28 U.S.C., Section 1254 (1).

> a clear chance to save him. It is insufficient to show that there was a mere possibility of doing so."

In accord:

> *Chesapeake Western Ry.* v. *Shiflett's Admrx.*, 118 Va. 63; 86 S. E. Syllabus 3.

Petitioners' contention that the Honorable Trial Judge held that the accident was an "Act of God" is wholly without merit. The cases involving actions by passengers against railroad carriers have no application to the instant case. The defense of Vis Major was not interposed by respondent. It had no application to the action. It was not necessary for respondent to show it was not negligent.

What petitioners overlook in the cases from which they quote dictum is that what these courts require to be taken as true in favor of petitioners are established facts. This is precisely what petitioners lack; they have no established facts.

The testimony of every disinterested witness; the uncontradicted physical facts, and the testimony of petitioner, Herbert Dyskant, when he testified on page twenty-five of the printed record on direct examination:

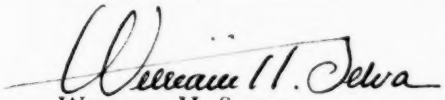
> "* * * Just before the accident he jumped the brakes and we swerved to the northbound lane, swerved to the left, and that is where the truck collided with the car"

fully support the decision of the Honorable Trial Court in directing the jury to return a verdict for the respondent. The affirmance of the judgment by the United States Court of Appeals for the Sixth Circuit is amply supported by the facts and Federal and Virginia authorities.

CONCLUSION

The judgment below is in all respects correct and it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



WILLIAM H. SELVA,
PICKREL, SCHAEFFER & EBELING,
608 Gas & Electric Building,
Dayton 2, Ohio,
Attorney for Respondent.

May 19, 1951.